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IN THE

Supreme Court of the United States

OCTOBER TERM 1955.

PATRICIA THURNAU, as Administratrix of the Estate of PHILIP GEORGE THURNAU, Deceased,

Petitioner,

against

ALCOA STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a judgment for defendant entered at the close of plaintiff's case after the granting of a motion by the defendant for a directed verdict and to dismiss the complaint, and affirmed by the Court of Appeals.

Opinion Below.

The opinion of the United States Court of Appeals, printed in Appendix B hereto, is reported at 229 F. 2d 73.

Jurisdiction.

The decision of the Court of Appeals sought to be reviewed was rendered January 16th, 1956.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. A. 1254 (1).

Constitutional Provision and Statutes Involved.

The constitutional provision applicable to the instant matter is Article 3, Sec. 2, Clause 1:

> "The judicial Power shall extend to all Cases . . . of admiralty and maritime jurisdiction; . . ."

The statutes involved are the Jones Act (46 U. S. C. A.) 688 *et seq.*) and the Federal Employers Liability Act (45 U. S. C. A. 51 *et seq.*).

Questions Presented.

Does the administratrix widow have a cause of action for wrongful death when the plaintiff's decedent is killed while acting in the course of employment within the meaning of the Jones Act by a fellow servant's negligence several miles from where the ship is docked where both seamen are under articles on shore leave, and plaintiff's decedent was being taken back to the ship, and the accident occurs on the road back to the ship because of haste in returning.

This question includes the following subsidiary questions which flow from the *per curiam* opinion of the Court of Appeals (Appendix B).

(a) Although the Court of Appeals Second Circuit had decided in the earlier case of *Kyriakos* v. *Goulandris*, 1945,

151 F. 2d 132, that the shipowner is liable for indemnity as well as for maintenance and cure where the injury occurs miles from the ship, and the Court of Appeals for the Third Circuit reached the same conclusion as applied to the reasoning of *all* cases of fellow servant negligence in *Nowery* v. *Smith*, 69 F. Supp. 755, aff'd 3 Cir., 1947, 161 F. 2d 732, are these cases to be construed as "assault cases, which appear to be *sui generis*," as the Court now holds and therefore entitled to extend jurisdiction comprising many more miles than ordinary cases of fellow servant negligence under the Jones Act.

(b) And if assault cases are to be construed so that they are to have many more miles of jurisdiction on land although the action is based on fellow servant negligence under the Jones Act upon what basis should other acts of fellow servant negligence like the almost unquestioned negligence in the case at bar be limited to jurisdiction embracing the area of the ship or, at most, adjacent to the ship?

(c) Would not assault cases then enjoy preferred and more advantageous treatment over other acts of fellow servant negligence? Was it not the intent of Congress and the Courts to treat assault cases from the point of jurisdiction, and otherwise like other acts of fellow servant negligence?

(d) Is the Court of Appeals of the Sixth Circuit in error in *McDonough* v. *Buckeye SS. Co.* (*supra*), when the law is stated to be that the shipowner is liable for fellow servant negligence during shore leave in an area removed from the ship, when it resulted from the act of taking a shipmate back to the ship.

(e) Is the Court of Appeals of the Ninth Circuit in error where it answers the crucial point of in the course

of employment in a compensation case reasoning so nearly analagous to seamen that the decision is reported in American Maritime Cases, when it upholds the findings of the Deputy Commissioner that when the employee is on the road back to his employment but miles from his place of work, and he is injured in a car accident by a fellow employee, the injury is compensable.

(f) If the negligence and injury occur "in the course of employment" by a fellow servant, does not the case fall within the Jones Act even though miles from the ship, and even though the case is not based on assault?

Statement.

There had been a bus strike by the Mobile City Line employees from June 15, 1950 through August 22, 1950. There was no service during this period. The service had consisted of operating approximately 117 buses which were withdrawn during the strike.

In May of 1950, 62,000 revenue passengers, 9,000 transfer passengers for a total of 71,000, were carried daily, over 13 different routes throughout the city. One of these routes served the area of the Aluminum Ore Company and was known as Route No. 9.

Far from various means of transportation being "readily available," as the Court of Appeals wrote in its opinion, the unimpeached testimony of Mr. Douville, the Vice President of the local U-Drive-It on the effect of the bus strike, was as follows; and deserves appropriate attention since the case was dismissed at the close of the plaintiff's case.

> "Q. You saw public appeals in the city press for people acting as citizens to pick up others, to transport them to work and back. Is that right? A. Yes.

> Q. And you saw public appeals that neighbors join with one another in forming car pools, to take people to work and return. Is that right? A. Yes, sir."

A number of the members of the crew came from Mobile. This is also the major port in the itinerary, since passengers were discharged at this port, old articles were terminated and new articles signed.

The defendant conducts extensive business operations insofar as shipping is concerned. It leases the Aluminum Ore Company docks in Mobile, where its vessels dock. The bauxite which it carries along with passengers is unloaded at Mobile to be processed.

With the state of transportation as severely curtailed as outlined above, and with no contradiction, if contradiction to stark figures and bare facts stated by Mr. Douville there could be, plans were made on the ship by First Assistant Engineer Kossman and Jr. Third Assistant Engineer Wold on how they would get transportation for shore leave.

Reese, an ordinary seaman, testified that "it is the usual practice the usual procedure is if I have a car or any member of the crew has a car, if anybody's ready to go to town at that particular time, we all just pile in and go to town. In other words, it's just working together" (R. 95). He further testified, as to the practise with reference to cars and returning crewmen:

> "Q. As a usual practice, does that always follow, when men meet in town, and one has the car, they all come on back to the ship? A. Yes, sir. That is, if they're going back at the same time, and the driver is ready to go."

Giving the plaintiff the most favorable light in view of the dismissal at the close of her case, it must be assumed

that Kossman, the First Assistant Engineer, and the third ranking officer of a valuable ship transporting valuable cargo, must have taken the practise of the crew with reference to cars into account. As a transportation man, he could not be deaf, dumb, and blind to conditions of local transportation which were so well publicized by the press and radio in Mobile, where defendant shipowner conducted its most important discharging operations of passengers and cargo.

Since the bus strike had been on without any let up since June 15th, 1950, and this was now July 20th, and the ship made only short runs from Mobile to the Carribean Sea, *at least a jury could say that Kossman, who had hired a U-Drive-It only once before, made his decision to hire the U-Drive-It on the ship as an officer of the defendant fully cognizant of conditions, shore leave, and the practise of the crew to be transported in this vehicle if made available.* Despite the ramifications which would ensue, he could have decided as such officer that shore leave would entail difficulties in getting back to the ship and missing of the ship by crew members, with attendant delays, and if not delays, difficulties in sailing short handed.

Regardless of the reason, the fact remains that on July 20th, 1950, the day of arrival of the SS. *Pegasus,* and at about 3 o'clock, **on the ship the decision was made by Kossman the first assistant engineer and Wold the third assistant to hire the U-Drive-It.**

Kossman, after being cleared by the U-Drive-It people, hired the car in his name.

After going to town in the U-Drive-It, Kossman and Wold went to the "Blue Cove" according to Wold's uncontradicted testimony "to have some drinks, and Kossman wanted to go to the dog races, and was trying to talk me into going with him. While we were having our drinks

Mr. Schultz, the third engineer, joined us. Kossman finally decided to go to the dog races, and I didn't want to go with him, and I refused to go with him, and stayed with Mr. Schultz to have a few more drinks."

Thus, there can be little doubt that Kossman, having participated only the day before the accident in drinking with Wold, a man of 21, knew that he drank. Kossman could also have inquired from Schultz, also an officer of defendant as to whether Wold had continued drinking.

According to the uncontradicted testimony, Wold visited several other drinking establishments, the day before the fatal accident.

All this is important for Kossman, as First Assistant Engineer, after the decision reached aboard ship, had loaned the car to Wold which resulted in the death of Thurnau, a fellow servant of both Wold and Kossman. In view of the fact that according to Corporal Phillips of the Alabama State Patrol that Wold was drunk at the time of the accident, and the horrible nature of the accident as shown by the photographs, and the injuries suffered by plaintiff's decedent, surely some explanation was forthcoming from Kossman, the First Assistant Engineer, a high ranking officer, entrusted with the lives of fellow seamen, as to why he loaned this car to Wold, a man of 21, known by Kossman to be a drinker.

That Kossman knew that members of the crew were being transported in the car is best shown on July 21st, *the day of the fatal accident. With Wold as the driver and Kossman in the car, some of the crew were picked up and brought to town* (Record 47; Court of Appeals Brief, p. 4).

The major point is repeated that the testimony shows that **only members of the crew were transported in this car for the two days embracing the time before the accident and including the time of the accident.**

Although the usual rule is for seamen to get their board and meals aboard ship and do their drinking ashore, Wold testified that he and Kossman went to the Joe Jefferson House to get something to eat. They left the ship at 5:30, it was 6:30 when they were eating and Wold said as early as 7:30 P. M. Wold drove Kossman back to the ship, because he was tired (S. M. 21).

Kossman, a seaman in port, a man in his thirties, apparently got sleepy at a rather early hour, and in a very short time, too, after having had something to eat at the Joe Jefferson House (S. M. 21). [Later Wold swore that he was not sure of the time and it could have been 9 o'clock (S. M. 29).] The difference in time would leave the observation on sleep and tiredness about the same.

[As has been noted, Wold testified to rather profuse drinking at several bars with Kossman and Schultz, both officers, only the day before. And it is noted that he personally knew the roadhouses just outside of town.]

[At the ship, Kossman asked Wold if he wanted the use of the car, which Wold accepted.]

It need hardly be written that not all juries would have relied on Wold's version of pure eating. In fact, a jury could have found that Kossman had one too many about an hour ago, was sleepy and wanted to go to bed, and was plain careless in entrusting the car to a 21 year old in the light of what happened later. If Wold had been drinking, with Kossman, at the same rate as the day before, Kossman did not act like a reasonably prudent mature man in turning the high powered "hot rod" over to Wold.

Since Wold was the survivor, we have only his version. Wold testified that he then took the car and visited friends. At midnight, he stated that when he went to return the U-Drive-It, he found it closed, and decided to keep it. Again and again he said that he did not notice the buses off the street, and when he went to the house of friends in

Mobile, nobody even mentioned the bus strike; and even though he subsequently resided in Mobile, he never heard of the strike; and although several fellow seamen like Reese came from Mobile, which was shown to be *the port of discharge for passengers* even those who boarded at New Orleans or Mobile, and even though Alcoa offices and piers were located in Mobile, and he had worked for almost 3 years on ships like the *Alcoa Patriot, which went but once farther north than Mobile, he knew nothing of the bus strike.* For three years after the accident and up until his testimony was taken at Mobile on September 23, 1953, he was kept so close to Mobile on defendant's ships that he did not even get a chance to visit the widow in New York for except for one trip the ships never got any further north than Mobile. On the one trip he had no chance since he only had one day in and around New York.

Yet despite all this activity centered in and about Mobile, he was curiously oblivious of any bus strike. **We wonder if Wold did not understand that the bus strike was the Achilles heel in the defense?**

How remarkable was this testimony obviously aimed at keeping even the mention of the bus strike out of Wold's testimony can be seen from the testimony of Mr. Douville, vice president of Mobile U-Drive-It (S. M. 118):

> "Q. You saw public appeals in the city press for people acting as citizens to pick up others, to transport them to work and back. Is that right? A. Yes.
>
> Q. And you saw public appeals that neighbors join with one another in forming car pools, to take people to work and return. Is that right? A. Yes sir."

Wold and Kossman were officers earning a livelihood in the transportation business. Could they have possibly been ignorant of a bus strike?

And the wonder of Wold's ignorance of the bus strike is not lessened by examining the testimony of another leading Mobile citizen, Mr. Don Killam, the manager of the Mobile City Lines, who was responsible for the figures on transportation cited above (S. M. 74-79).

On the other hand if young Wold was as blind as his testimony reveals, surely Kossman was negligent in giving the car to Wold knowing that he might pick up fellow seamen and transport them back to the ship. Could just plain eating at the Joe Jefferson House have wrought this as it brought about the tiredness in Kossman who had to go back to the ship at either 7:30 or 9 o'clock? **IF IT WAS DRINK, SURELY THURNAU IS NOT RESPONSIBLE FOR WOLD'S CONDITION HAVING FIRST MET WOLD AFTER MIDNIGHT.**

At any rate, after midnight Wold went to the Tapson House and was having a drink when he met Thurnau. They decided to go to the **Vogue** where it will be remembered Wold was no stranger, having been there the night before, only this time Wold had the car, while the night before Kossman had taken the car to the dog races at Pensacola.

They had only one drink at the **Vogue.** "Since the **Vogue** was even deader than the Tapson House" they decided to go to a **Crystal Springs** which they could not find. So they then decided to go to the **Temple Gardens,** which is on Highway 90. The account of the accident follows (S. M. 23):

"I did not know how to cut across from where we were at to Highway 90. I did know how to come back into town and **go out Highway 90, which I did do.** We went to the Temple Gardens, which seemed to me to be quite a rough place. We were standing at the bar having a drink when I noticed there was a dice game going in the back room, so we went in to watch the game. As the dice were passed

around, they were handed to me, so I took my turn rolling them. When I lost the dice, I passed them to Mr. Thurnau, and asked him if he wanted to try it, which he did. We shot dice as they came around to us until someone mentioned it was almost 5 o'clock, which Thurnau and I realized was getting late for us, as we were supposed to be back to the ship by six. So we left as fast as possible, got in the car and I took the wrong direction. **As the Temple Gardens is on the main highway, and me not being familiar with Mobile, both directions looked the same to me. After I had gone a few miles, I did realize that I was headed in the wrong direction as there was no houses. I turned the car around and started back toward Mobile. I hit a curve and the rear of the car skidded. I tried to bring it back, when it skidded in the opposite direction, and there I must have hit a bump and got knocked out."**

Corporal Phillips of the Alabama State Patrol testified that about 5:20 A. M., he received a call on an automobile wreck 2 miles west of Theodore. The party who placed the call had come upon the scene of the accident, gone to Theodore two miles away and made the call. Theodore is just on the outskirts of Mobile. The time of the accident was probably about 5 A. M. and there is no question that had not the mishap occurred, there would have been ample time to return to the ship which left at 6 A. M.

WOLD TOLD CORPORAL PHILLIPS THAT HE HAD THE CAR WIDE OPEN

Photographs taken at the scene by Corporal Phillips' partner within 25 or 30 minutes of the accident shows that radiator emblem was imbedded in a telephone pole **on the left side of the road** about 10 feet in the air, and that ***at the same height it had skimmed the bark from a tree neighboring the telephone pole.***

Wold himself testified that he was going over 70 miles per hour, without specifying how much above. The photographs did not require Wold to specify the speed, for it is safe to deduce that this almost new Ford being run with the throttle wide open was at a speed conservatively estimated as most dangerous. For a car to fly some 10 feet in the air as the pictures demonstrate, and with the throttle wide open on this car as Wold testified, one can easily deduce that the speed was hardly what a prudent man would use to operate such a vehicle.

Corporal Phillips also testified that from Wold's actions, speech, he was drunk.

Wold merely suffered a broken ankle which hospitalized him for a few days and kept him out of work about 3 months.

An ambulance took them to the Marine Hospital, where Thurnau died shortly after arrival. An autopsy was made by Dr. Wirt. *There is nothing in his report to show any drinking by Thurnau.*

The autopsy report on Thurnau showed:

1. Laceration of liver and spleen, severe, due to trauma with hemorrhage into peritoneal cavity, severe.

2. Hemothorax, right, severe due to trauma.

3. Laceration of diaphragm, right, liver, severe, due to trauma.

4. Comminuted fractures of ribs, multiple due to trauma.

5. Dislocation of femur at hip, left due to trauma.

Post mortem studies revealed comminuted fractures of the 7th, 8th, and ninth ribs on the left right hemothorax, traumatic hernia of the right dome of the diaphragm, multiple laceration of the right dome of the liver, multiple

lacerations of the spleen, and massive hemorrhage in the abdominal cavity.

By stipulation Kossman was the only live witness to have been called by the defendant. Defendant was only to have in addition a short deposition of a crew member and the deposition of Dr. Grubbs, a coroner.

By stipulation, Thurnau's wage record with Alcoa shows the following earning record: 1945, $3,037.80; 1946, $3,307.65; 1947, $6,549.55; 1948, $1,792.23; 1949, $5,328.67; 1950, $3,641.58. He left him surviving a widow, age 36 and a daughter, age 11. Thurnau was 39 years old at the time of his accident, which was the competent producing cause of death.

Reasons for Allowance of Writ of Certiorari.

A.

The determination of the Court below is in conflict with decisions of other Courts of Appeals on a federal question of importance. Two opinions almost on all fours by Two Courts of Appeals are not even cited much less distinguished in the decision sought to be reviewed although strongly relied upon in petitioner's brief.

1. The decision sought to be reviewed is contrary to the law recently set forth by the Court of Appeals of the Sixth Circuit in *McDonough* v. *Buckeye SS. Co.*, 103 F. Supp. 473, aff'd. 200 F. 2d 558, certiorari denied 345 U. S. 502. This decision was not even cited by the Court in the decision sought to be reviewed. A reading of petitioner's main brief of 28 pages and his reply brief of 11 pages will show very strong reliance upon this case. Petitioner repeatedly called the Court's attention to the fact that the Sixth Circuit had passed upon the question of law applicable to the case at bar.

The Court of Appeals of the Sixth Circuit held that under the Jones Act the shipowner is liable for the fellow servant negligence of a seaman taking a shipmate back to the ship. Bringing a fellow seaman back to their ship is:

> "... an act of a servant which is in furtherance of the master's interest, is an act in the course of and within the scope of his employment."

In the decision sought to be reviewed, Wold was taking Thurnau back to the ship under whose articles they were, and the accident arose out of haste in so doing, while they were on the direct road back to the ship. It is respectfully submitted that it was an act of a servant which was in furtherance of the master's interest, and is an act in the course of and within the scope of his employment falling squarely within the reasoning of the *McDonough* case.

2. The decision sought to be reviewed is contrary to the law recently set forth by the Court of Appeals of the Ninth Circuit in *Hostolf-Nettles, Inc.* and *United Pacific Ins. Co.* v. *Pillsbury,* 203 F. 2d 641 (1953); A. M. C. 746. Nor was this decision cited in the decision sought to be reviewed although petitioner called the Court's attention to the fact that on the facts and reasoning, the Ninth Circuit had passed upon the question of law applicable to the case at bar.

On pages 22 and 23, petitioner devoted all of his "Point V" to the case in the Ninth Circuit. An analysis of the facts in that case with the facts in the case at bar will show striking closeness of the facts and reasoning of the Ninth Circuit decision with the case sought to be reviewed.

It may be added that although this was a non-maritime case, it was reported in American Maritime Cases, a set which is devoted almost exclusively to maritime matters.

However, the reasoning was so nearly applicable to seamen, that the editors thought it proper to include the case, within the volumes so extensively used by maritime lawyers.

3. The decision sought to be reviewed is contrary to the law as written in the Third Circuit on fellow servant negligence ashore during shore leave in *Nowery* v. *Smith*, 69 F. Supp. 755, aff'd. 161 F. 2d 732.

The flat unequivocal language of *Nowery* v. *Smith* with reasoning based upon Supreme Court decisions is on "all fours" and should fully cover the proposition of law in the case sought to be reviewed.

The opinion is well considered and logically points out that the shipowner is liable for fellow servant negligence on shore leave since shore leave has been found to be ship's business. The reasoning makes no narrow distinction as to the case arising from an assault. It applies to all fellow servant negligence ashore.

Because of the importance of the language and reasoning, petitioner quotes the language from *Nowery* v. *Smith* which also appears on page 13 under Point II of his brief in the decision sought to be reviewed.

> "I recognize that in the *Aguilar* case, and the companion case, Waterman SS. Co. *vs.* Jones, the Supreme Court expressly limited its decision to the facts before it. However, in both cases, it seems to me that it was the occasion for the seaman's absence from the vessel—shore leave which determined that he was "on the shipowner's business" while he was on premises which had to be traversed in going from or returning to the vessel. That being so I think that logic compels the conclusion that the seaman should also be considered on the shipowner's business while he is actually enjoying shore leave. **And if for the purpose of determining the shipowner's liability for**

> maintenance and cure, the seaman is said to be on the shipowner's business while on shore leave I can see no valid reason why for the purpose of determining the Shipowner's liability under the Jones Act, the seaman should not be said to be 'in the course of his employment' at the same time. It is simply a question of defining the seaman's status; and I think that the concepts 'on the shipowner's business' and 'in the course of employment as they are applied to the seafaring trade, comprehend identical factual situations'."

There is nothing in the reasoning which suggests that the case is *sui generis* because it is an assault case. Much less does it intimate that an assault case should give greater rights and encompass a wider area of jurisdiction from the ship than Wold's fellow servant negligence inflicted on Thurnau.

Even the decision sought to be reviewed held:

> "There was sufficient evidence from which a jury could find that Thurnau's death was caused by the negligence of Wold in the operation of the car."

Since the decision also is based on the assumption that "Thurnau was acting 'in the course of employment' within the meaning of the Jones Act while returning to his ship from shore leave—", how then in view of the startling negligence of Wold as fully demonstrated by the photograph admitted in evidence and appended to this petition, can it be logically held that Thurnau's widow and child could recover if Wold had fatally assaulted Thurnau, but not if Wold had negligently caused Thurnau's death.

Examining the earlier cases in the Supreme Court on assaults, it will be found that the basis of recovery was *negligence*. Fellow servant negligence was held to be fellow servant negligence whether it was an assault or any other

type of negligence. The Supreme Court never intimated that an assault case was *sui generis*, and therefore the injured party in the average case of negligence was entitled to less than the victim of an assault inflicted by a fellow servant.

Alpha S.S. Corp. v. *Cain*, 281 U. S. 642;
Jamison v. *Encarnacion*, 281 U. S. 635.

The decision in the case sought to be reviewed places a narrow and rigid construction on the Jones Act which is contrary to the liberality with which the Supreme Court has held that the Act is to be construed, and finds no basis in the opinions of this Court.

Cortes v. *Baltimore Insular Line*, 287 U. S. 367.

B.

The Supreme Court is being petitioned to review a decision involving an important federal question of substance which has not yet been determined by this Court.

1. The question is novel with respect to indemnity, for fellow servant negligence committed ashore during shore leave. For maintenance and cure this Court decided *Aguilar* v. *Standard Oil Co. of N. J.*, 318 U. S. 724 and *Warren* v. *U. S.*, 340 U. S. 523. Neither case involved fellow servant negligence under the Jones Act.

O'Donnell v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 63, determined that negligence ashore is within the purview of the Jones Act. Chief Justice Stone wrote:

> "The right of recovery under the Jones Act is given to the seaman as such, and, *as in the case of maintenance and cure*, the admiralty jurisdiction over the suit depends *not on the place where the*

injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.

It would therefore seem from the rule set forth, that the area of jurisdiction is not confined to the area adjacent to the ship, as the decision holds in the case sought to be reviewed. Since this Court in maintenance and cure cases gives a much wider radius, and Chief Justice Stone compares the same radius for indemnity as for maintenance and cure, it would appear that *fellow servant negligence* would be bounded by the same limits, as the Third Circuit so well reasoned in *Nowery* v. *Smith.*

There is nothing in the language of O'Donnell, which would warrant the opinion in the decision sought to be reviewed, that for Jones Act negligence the limit is the area adjacent to the ship. There is nothing in the language of Aguilar, or Warren, which would limit the reasoning only to maintenance and cure just because fellow servant negligence was not involved in the case.

In any event, with the diverse opinions expressed by several Courts of Appeals as to the interpretation of cases decided by this Court a writ of certiorari should be granted on this important federal question not only for the sake of uniformity as we have urged under I, but also to clarify the cases of this Court with respect to jurisdiction on land under the Jones Act where indemnity is sought for fellow servant negligence.

C.

The Supreme Court is being petitioned to review a decision where the Court of Appeals decided questions of fact in affirming a judgment dismissing the complaint at the close of plaintiff's case, in a jury trial. This was a denial

of due process of law and contrary to the Constitution of the United States.

Since the case was dismissed at the close of plaintiff's case in this death action, it can be seen from the plaintiff's testimony that there was no basis whatever for the Court of Appeals to find that other means of transportation were "readily available".

The unimpeached testimony of Mr. Douville, the Vice President of the U-Drive-It Company, engaged in the business of transportation, in the City of Mobile, furnished absolutely no basis for the Court of Appeals to decide what only a jury could determine as a fact.

Supporting the testimony of Mr. Douville, were the records of the Mobile City Line, referred to in the Statement showing that the strike lasted from June 15, 1950 through August 22, 1950, that there was no service during this period, and that their entire 117 buses were withdrawn during the strike.

This testimony was of great importance since Kossman, the First Assistant Engineer, a high ranking officer of this inanimate corporate defendant, planned the hiring of the car on the ship, and did transport members of the crew on the day of the accident in accordance with Reese's testimony that it was common practice, and did turn the car over to Wold, at the dock by the ship, shortly before the accident. Only members of the crew had been transported in this car to and from the ship.

To say that Kossman, the third officer in command of the ship and crew was not acting for the benefit of the shipowner, justifying a dismissal of the complaint at the close of plaintiff's case, in view of the testimony of Douville, Reese, and the Mobile City Line, violates plaintiff's constitutional right of trial by jury.

The decision completely ignores common experience which teaches us that under the conditions described by

Douville, **transportation to and from the ship was far from being "readily available"**, for why would there be public appeals "that neighbors join with one another, in forming car pools, to take people to work and return".

To further show how unavailable even the U-Drive-It actually was, the undisputed fact was that only Kossman had been cleared by the U-Drive-It people. Kossman had to be cleared by the U-Drive-It people before even he could get this means of transportation, and that this clearing came only from a process of checking on the applicant's background, all of which would naturally take time. Therefore, it is easy to see that even rented cars were not "readily available", and certainly the rented car used in the fatal accident was anything but "readily available."

It was available only because Kossman, a high ranking officer of the defendant, made it available for transporting members of the crew, *for there was no testimony that anybody but crew members were transported in the vehicle.*

Further, it is respectfully submitted that when Kossman, First Assistant Engineer, of the inanimate corporate defendant, knew that Wold, Jr., Third Assistant Engineer, was a drinking man at 21, since Kossman himself had been drinking with him, it was solely a question of fact to be submitted to a jury, as to whether defendant was liable for Kossman's turning the car over to Wold at the dock, and going to bed, knowing there was a bus strike and it was common practice on ship to take members of the crew to and from the ship. Especially since the Alabama State Patrol found that Wold was drunk at the time of the accident, an explanation from Kossman, to satisfy a jury was forthcoming.

Although the decision is correct that a shipowner is under no obligation to furnish transportation, the law is well settled that liability can follow for negligence where the

employer does in fact furnish transportation. The fact that originally he was under no obligation so to do, does not relieve the employer for the ensuing negligence after he does do what he was originally not called upon to perform.

Spencer Kellogg & Sons v. *Hicks*, 285 U. S. 110;
Heaney v. *Carlin Construction Co.; Matter of*, 269 N. Y. 93;
Westcott v. *U. S. Fidelity & Guaranty Co.*, 156 F. 2d 20 (4th Cir., 1946).

How then can a Court of Appeals decide that Kossman, did not act for the benefit of the ship in transporting crew members during this strike **when it is undisputed from the record that only crew members were transported in this vehicle both prior to the accident and at the very time of the accident.**

To support the decision sought to be reviewed the Court cited *Paul* v. *United States*, 3 Cir., 1953, 205 F. 2d; *Lemon* v. *United States*, D. C. Md., 1946 Md., 1946, 68 F. Supp. 793. Neither of these clearly distinguishable cases has the slightest application to the novel principle of fellow servant negligence ashore during shore leave. **Both of these cases decide that a shipowner is not responsible for the negligence of a third party, independent contractor, who is not a member of the crew.**

Even the Court of Appeals of the same circuit (with three different members of the bench) has very recently shown the law to be that the shipowner is not liable for the transportation of members of the crew to and from the ship by a third party, who is not a member of the crew (*McCall* vs. *Overseas Tankship*, 222 F. 2d 441.)

Judge Learned Hand, in a concurring opinion, in the *McCall* case significantly rested his decision on the fact

that the party furnishing the transportation was a third party. On the question of "in the course of employment", which is the crucial question in the case sought to be reviewed, he preferred to leave that open even though the accident and negligence occurred many miles from the ship.

The following are necessary conclusions:

(1) In view of the unquestioned fellow servant negligence of Wold, if the accident occurred in the course of employment as McDonough (*supra*) in the Sixth Circuit, Hostolf-Nettles (*supra*) in the Ninth Circuit, and Nowery (*supra*) in the Third Circuit, all hold, then the shipowner would be liable as a matter of law under the Jones Act.

(2) There was at least a question of fact as to whether Kossman, as First Assistant Engineer of defendant, did not commit an act of fellow servant negligence in turning over the car to Third Assistant Engineer Wold, at the dock, having planned the hiring of the car with Wold on the ship, during a bus strike, when members of the crew were transported in the car, both prior to and at the time of the accident.

(3) Although as a general rule the shipowner would be liable only for maintenance and cure for most accidents during shore leave occurring miles from the ship since there is usually no fellow servant involved, nevertheless in those unusual cases like the case sought to be reviewed there is liability for indemnity when the accident arises in the course of employment at the hands of a fellow servant. For the purpose of liability assault cases are not *sui generis* endowed with a larger measure of jurisdiction than other cases of fellow servant negligence.

Conclusion.

A. We have shown by the decisions of three Circuit Courts of Appeals and the Supreme Court the liability for the negligence of Wold as a matter of law.

1. Taking a shipmate (drunk or otherwise) back to his ship is within the scope of employment and within the Jones Act. It is "an act of a servant which is in furtherance of the master's interest, is an act in the course of and within the scope of his employment." (*McDonough* vs. *Buckeye SS. Co.*)

2. "And if for the purpose of determining the shipowner's liability for maintenance and cure, the seaman is said to be on the shipowner's business while on shore leave I can see no valid reason why for the purpose of determining the shipowner's liability under the Jones Act, the seaman should not be said to be 'in the course of his employment at the same time.' " (*Nowery* v. *Smith.*)

There would be liability for the clear negligence of Wold as a matter of law.

3. Where men are stationed within limited confines for long periods of time, are allowed leave, and while returning to the place of work in an automobile where injuries result from the negligence of a co-employee, said injuries arise out of and in the course of employment even though the automobile is miles from the place of work as long as it is on the road returning the men to their place of work. (*Hostolf-Nettles Inc. and United Pacific Ins. Co.* v. *Pillsbury*)

4. Wold testified that he got on the right road back to the ship but in a strange place both directions back to the

ship looked the same to him. When he did not see houses which should have appeared, he realized he had taken the wrong direction. Because of this, he had to speed up the car to get back to the ship in time. The accident arose on shipowner's business and because of obtaining relaxation in strange surroundings.

These facts are squarely within the reasoning of the Supreme Court in Aguilar.

> "The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If, in those surroundings, the seaman incurs injury, it is because of the voyage, the shipowner's business.... Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment."

More recently the Court has reiterated the above in *Warren* v. *U. S.*

It must be borne in mind that:

1. The accident arose while the men were returning to the vessel.

2. The accident arose because the men had taken the wrong road and when they were on the right road were hurrying to the vessel to leave in accordance with orders posted on the ship.

3. The accident arose while the men were under articles which they had signed only the previous day in the same port.

4. The accident arose during a bus strike of such magnitude that there were public appeals over the radio and in the press for car drivers to assist co-employees in going and coming from work.

5. The accident arose because Kossman, a high officer on the ship of defendant, a corporate object

that must act through officers, gave Wold the car at the ship knowing as anybody must that the bus strike had caused a tight transportation situation, and that as Reese testified it was customary to transport members of the crew to and from the ship in any available car. (Strikes without publicity and inconveniences are unheard of.) Wold and Kossman were officers engaged in the transportation business. Mobile was was the port of discharge of passengers.

There was no testimony that Wold had ever hired a U-Drive-It in Mobile, before this strike. Kossman had hired such a car only once before, and had been cleared.

The strike had been on from June 15, 1950 through August 22, 1950. The accident occurred July 21st, 1950. Mobile was the port of call on the run of the *Pegasus,* where articles were signed, passengers discharged and defendant maintained an important office and docks. Many of the crew members came from Mobile.

6. Kossman and Wold had agreed to hire the car on ship on the day of arrival.

B. If the Court is unwilling to go as far as the cases set forth above as a matter of law, then the case should have gone to the jury on the testimony of Wold.

The question of fact for the jury is whether at the ship was Kossman, an officer of the defendant, negligent in turning the car over to Wold knowing either:

a. That Wold was a drinking man at 21 since the day before at least he and Wold had been drinking together, and might be drunk when transporting a crew member. (The fact is that State Patrolman Corporal Phillips found Wold to be drunk at the time of the accident.)

b. That Wold was being entrusted with a car capable of great speed and that he might drive other

crew members back to the ship since there was a bus strike in Mobile which had resulted in public appeals for people with cars to join in and transport their neighbors.

c. That Kossman had only seen Wold drive at most but very little.

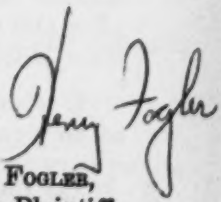
d. Only members of the crew were transported to and from the ship before and at the time of the accident.

Under the undisputed facts of the wanton and reckless speed at which the car was driven and since this is a death action, it was incumbent upon Kossman to give an explanation which would have to be submitted to the jury.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Dated March 31, 1956.

Respectfully submitted,



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Appendix A.

Opinion Below.

PER CURIAM:

Plaintiff's decedent, Philip G. Thurnau, a third mate of the SS. *Alcoa Pegasus*, died as the result of injuries sustained while riding as a passenger in an automobile driven by a fellow crewman, Wold. Thurnau and his companion were returning from shore leave to their duties aboard ship at the time of the accident. There was sufficient evidence from which a jury could find that Thurnau's death was caused by the negligence of Wold in the operation of the car. The car had been rented and lent to Wold by a third member of the ship's crew, Kossman.

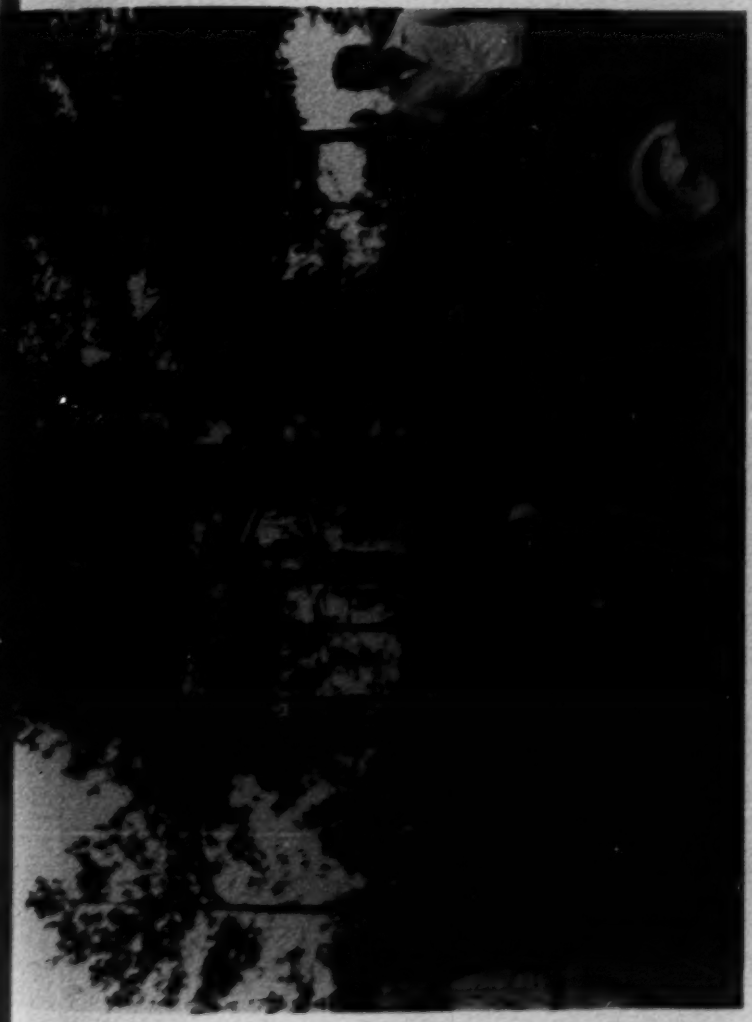
The sole question on this appeal—even if we assume, *arguendo*, that Thurnau was acting "in the course of employment" within the meaning of the Jones Act while returning to his ship from shore leave—is whether a shipowner is under a duty to provide a safe means of transportation between the ship and any place of amusement crew members desire to visit while on shore leave in the vessel's home port. We think it clear that the shipowner is under no such duty, and is therefore not liable under the Jones Act for the negligence, if any, of Wold and Kossman in renting and operating a car for their private pleasure while on shore leave. See *Paul* v. *United States*, 3 Cir., 1953, 205 F. 2d 38; *Lemon* v. *United States*, D. C. Md., 1946, 68 F. Supp. 793.

The absence, because of a bus strike, of bus transportation from the dock to the places of amusement frequented by these sailors does not make the shipowner responsible for the safety of the other readily available means of transportation, such as taxis or rented cars, that may happen to be chosen by the crew. The cases relied on by the plaintiff are all distinguishable. Some are maintenance and cure cases, *Warren* v. *United States*, 340 U. S. 523 (1951); *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724 (1943). Some are assault cases, which appear to be *sui generis*, *Nowery* v.

Smith, 69 F. Supp. 755, aff'd 3 Cir., 1947, 161 F. 2d 732; *Kyriakos* v. *Goulandris*, 2 Cir., 1945, 151 F. 2d 132. And the remainder are cases involving negligence of the shipowner in creating or maintaining dangerous conditions adjacent to the ship, *Marceau* v. *Great Lakes Transit Corporation*, 2 Cir., 1945, 146 F. 2d 416; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943).

Affirmed.

Appendix B.



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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 810

PATRICIA THURNAU, as Administratrix of the Estate of Philip George Thurnau, Deceased,
Petitioner,

against

ALCOA STEAMSHIP COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT ALCOA STEAMSHIP COMPANY, INC., IN OPPOSITION

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on the Brief.

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STATUTES CITED

Act of June 5, 1920, Sec. 33, C. 250, 41 Stat. 988, 1007, Title 46, U. S. Code, Sec. 688 (Jones Act) 2

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---

BRIEF OF RESPONDENT ALCOA STEAMSHIP COMPANY, INC., IN OPPOSITION

Opinions Below

There was no opinion in the District Court. Defendant's motion to dismiss the complaint made at the close of plaintiff's case was granted by the Trial Judge (J. A.* 108; S. M.** 147).

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* J. A. refers to the joint appendix in the United States Court of Appeals for the Second Circuit.

** S. M. refers to the stenographer's minutes of the trial proceedings.

The opinion of the United States Court of Appeals is reported at 229 F. 2d 73 and is set forth as Appendix "A" on pages 27 and 28 of the petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

The Statute Involved

Plaintiff brought the action under § 33 of the Act of June 5, 1920, C. 250, 41 Stat. 988, 1007; Title 46, United States Code, § 688, commonly known as the Jones Act.

Question Presented

The United States Court of Appeals for the Second Circuit in a *per curiam* opinion (Petition Appendix "A", p. 27) phrased the question in the following manner:

> "The sole question on this appeal—even if we assume, *arguendo*, that Thurnau was acting 'in the course of employment' within the meaning of the Jones Act while returning to his ship from shore leave—is whether a shipowner is under a duty to provide a safe means of transportation between the ship and any place of amusement crew members desire to visit while on shore leave in the vessel's home port."

Statement

The fact that there was a bus strike in Mobile was not known to the 1st Assistant Engineer and the 3rd Assistant Engineer of the vessel at the time they decided to hire a U-Drive-It car.

Wold, the driver of the car, testified that he knew nothing about the bus strike (S. M. 25-26; J. A. 29) and that the men paid no attention to such things (S. M. 37; J. A. 36):

> "Q. Now, I want you to think back and see if you can recall whether or not there was a bus strike on, around July 20th, in Mobile. A. Well, as I said before, buses didn't make much difference to us, and we never paid any attention to them. It might have been mentioned, but it would just have been water over the bridge."

It was common practice on the part of seamen to rent automobiles ashore (S. M. 28; J. A. 30; S. M. 113-114; J. A. 84-85) and for the crew to pile in and out of rented cars whether there was a bus strike on or not (S. M. 97; J. A. 74).

Even when the buses were operating the bus company schedules did not take into consideration the fact that a steamship might be tied up at the pier, and the schedule called for only four buses leaving the pier area after 5:00 P. M., and none after 11:00 P. M. (S. M. 76-78; J. A. 60-62).

Knowledge of the bus strike on the part of two local Mobile residents, one the manager of the Mobile City Bus Line (S. M. 75, 76; J. A. 60) and the other the vice-president of the Mobile U-Drive-It (S. M. 117; J. A. 87), cannot be imputed to the ship's personnel.

Any U-Drive-It cars rented by the members of the crew of the vessel were for their sole use and pleasure and were not used for ship's business, were not hired at the direction of the ship's officers, and were paid for by the crewmen themselves. No permission was required from the master or officers of the vessel in order to hire a car ashore (S. M. 27, 28; J. A. 29, 30; S. M. 58, 59; J. A. 48, 49). The contract for the renting of the car was made directly between the individual seaman and the U-Drive-It office, the latter looking only to the seaman for payment of the

rental or damages and not to respondent Alcoa Steamship Company, Inc. (S. M. 114-115; J. A. 85-86).

It was not the practice of the respondent in any port to furnish transportation to crew members to and from the ship to places of amusement ashore (S. M. 59; J. A. 49). No orders were ever issued either from the ship or from any shore office regarding affording transportation to other members of the crew in rented cars (S. M. 58, 59; J. A. 49).

Wold and a member of the crew both testified that if a member of the crew was given a lift in a U-Drive-It car rented by another crew member, then that was done as a friendly gesture and it was not a compulsory service or duty. If other personnel were ready to leave the vessel on shore leave at the time the renter of the U-Drive-It car was ready to leave, then they were given a lift (S. M. 27-28; J. A. 29-30; S. M. 95-96; J. A. 72-73).

The sequence of events leading up to the fatal automobile accident was as follows:

Philip George Thurnau served as third mate of the s/s Alcoa Pegasus in the employ of the defendant, Alcoa Steamship Company, Inc. On July 19, 1950, that vessel put into the port of Mobile, Alabama.

On the date of arrival, July 19, 1950, Kossman, 1st Assistant Engineer of the vessel, and Wold, 3rd Assistant Engineer, decided that Kossman would rent a U-Drive-It car for their personal use while ashore (S. M. 18, 19; J. A. 24, 25).

On the evening of the vessel's arrival, July 19th, Kossman and Wold in the U-Drive-It car went into town and later in the evening Wold remained in Mobile while Kossman went to the dog races in Pensacola in the rented car (S. M. 18, 19; J. A. 24). Wold returned to the vessel by taxi (S. M. 20, 21; J. A. 25).

On the afternoon of July 20, 1950, after the day's work aboard ship was finished at 5:00 P. M., Kossman and Wold left the ship in the U-Drive-It car (S. M. 21; J. A. 25, 26). After eating dinner ashore, Kossman told Wold he had decided to turn in early, but that Wold could use the car if he would return it to the U-Drive-It office before 12 midnight, which was closing time. Wold agreed and drove Kossman back to the vessel, after which he went to visit friends in Mobile, where he stayed until approximately midnight. He then drove the car directly to the U-Drive-It office, but found it closed (S. M. 21-22; J. A. 26). At that point Wold decided to keep the car and started making the rounds of various places in Mobile, first going to the Tapson House for a drink. There he met the deceased, Thurnau, at the bar and the two men had a few drinks together (S. M. 22; J. A. 26).

In an effort to find more lively places, Wold and Thurnau then went from one road house to another, finally ending up at a place called Temple Gardens at about 3:00 o'clock on the morning of July 21, 1950 (S. M. 22, 23; J. A. 26, 27). There they stayed, drinking and playing dice until approximately 5:00 A. M., just one hour before the scheduled sailing time of the vessel (S. M. 23; J. A. 27). They then got into the U-Drive-It car, with Wold driving, and in attempting to return to the ship started out in the wrong direction. Realizing that they were heading away from the vessel, Wold turned the car around and started down the highway in the other direction at high speed (S. M. 23; J. A. 27). Near Theodore, Alabama, on the outskirts of Mobile, the car struck a telephone pole (S. M. 23; J. A. 27; S. M. 80-83; J. A. 63-65). As a result of this accident Thurnau died.

Argument

A shipowner is not liable *per se* for all negligence of one employee towards another while those two may be

"in the course of employment" within the meaning of the Jones Act. An additional element is necessary.

In order to render the shipowner liable the fellow-servant must be acting in furtherance of the ship's business, or in the scope of employment. If the fellow-servant at the time of the negligent act is not performing a duty which the shipowner itself has a duty to perform, then the negligence of the fellow-servant cannot be imputed to the shipowner.

The affirmance by the United States Court of Appeals was based upon the fact that the shipowner respondent, Alcoa Steamship Company, Inc., was under no duty to provide a safe means of transportation to places of amusement visited by the deceased and Wold on the evening of the former's death.

The Court of Appeals did not believe that the bus strike in Mobile had any bearing upon the case. In the words of the *per curiam* opinion (Petition Appendix "A", page 27):

> "The absence, because of a bus strike, of bus transportation from the dock to the places of amusement frequented by these sailors does not make the shipowner responsible for the safety of the other readily available means of transportation, such as taxis or rented cars, that may happen to be chosen by the crew. * * *"

This Court has been well aware that in order to have negligence imputable to the shipowner under the Jones Act it is necessary that the negligent act be in some way connected with service to or operation of the vessel in navigation. Mr. Chief Justice Stone so stated in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943), when he wrote at page 42:

> "The right of recovery under the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the

> suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

The United States Court of Appeals in the instant matter did not state that the petitioner could not recover because decedent was injured ashore. The basis for the decision was that the negligence of Wold was not committed while he was performing a service for the vessel and had no connection with the operation of the s/s Alcoa Pegasus.

The Decision Below Is Clearly Correct

On the trial before the Honorable Thomas F. Murphy, U. S. D. J., and a jury, the defendant moved at the close of plaintiff's case to dismiss the complaint against the defendant and further moved for a directed verdict for the defendant upon the ground that the plaintiff had failed to prove any cause of action based upon negligence and had failed to otherwise establish a *prima facie* case against the defendant (S. M. 136; J. A. 100). This motion was granted by Judge Murphy (S. M. 147; J. A. 108).

On appeal to the United States Court of Appeals for the Second Circuit that Court, in a *per curiam* opinion, affirmed, holding:

> "• • • We think it clear that the shipowner is under no such duty [to provide a safe means of transportation between the ship and any place of amusement crew members desire to visit while on shore leave], and is therefore not liable under the Jones Act, 46 U. S. C. A. § 688, for the negligence, if any, of Wold and Kossman in renting and operating a car for their private pleasure while on shore leave. • • •"

The decision of the Court of Appeals was predicated upon the fact that any negligence on the part of Wold

in connection with the operation of the rented car was not to be imputed to his employer, the defendant-shipowner, since the shipowner had no obligation to provide such transportation in the first place.

Nor does the fact that Wold and the deceased were returning to the ship at the time of the automobile accident alter the picture in any manner, as is urged by the petitioner. Wold and the deceased were hurrying back to the ship at over 70 miles an hour, not because the shipowner had ordered them to do so, but because they had drastically overstayed their shore leave. They were supposed to be back aboard the ship one hour before the 6:00 A. M. sailing time, and at 5:00 A. M. they were still drinking at the Tapson House beyond the limits of the city of Mobile.

The fact that it may be to the benefit of the shipowner to have the crew aboard the ship before she sails does not impose responsibility upon the shipowner for all the foolish acts of the crew while trying to return aboard. Corporal Phillips of the Alabama Highway Patrol testified that Wold was drunk and that the odor of liquor was heavy on Thurnau (S. M. 82-83; J. A. 65).

In *Robinson, Admx.* v. *Northeastern Steamship Corporation*, 228 F. 2d 679 (2 C. A. 1956), the Court held that in order to render a shipowner liable under the Jones Act for a fellow seaman's negligence the seaman must be found to have violated a legal duty owed by the shipowner. Deceased was so intoxicated as to be unable to take care of himself. The Court of Appeals wrote as follows (228 F. 2d 681):

> "In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. *Without such authorization, Woods was not acting within the scope of his employment and his negligence, if any, in performing his voluntary under-*

taking could not be imputed to the defendant even if successful performance would further the interest of the shipowner. * * *" (Emphasis supplied.)

The fact is, of course, that the initial renting of the car by Kossman and its use by Wold were neither requested nor authorized by the defendant and were not in accordance with any custom recognized by the defendant.

In *Brailas* v. *Shepard S.S. Co.*, 152 F. 2d 849, 850 (2 C. A. 1945), cert. den. 327 U. S. 807, Judge Clark wrote as follows:

> "It is well established that a master will not be liable for the negligent acts of his servant unless they are performed in the course of or in furtherance of the master's business; the fact that the injury is done during the continuance of employment is not enough. *Davis* v. *Green*, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299; *Bonsalem* v. *Byron S.S. Co.*, 2 Cir., 50 F. 2d 114; *Lykes Bros. S.S. Co.* v. *Grubaugh*, 5 Cir., 128 F. 2d 387, modified on rehearing 5 Cir., 130 F. 2d 25."

To the same effect is the ruling of District Judge Bondy in *In re Southern Pacific Co.*, 30 F. 2d 723 (S. D. N. Y., 1928), affirmed on the opinion below 30 F. 2d 725 (2 C. A. 1929). Judge Bondy wrote at 30 F. 2d 724:

> "It was not intended by that act [Jones Act] to impose liability on the master for the negligence of a servant while acting beyond the scope of his employment, though furthering the interests of his master. Were it otherwise, there would not be any limit to the liability of an employer for the unauthorized act of an employee undertaking to do anything the employee may consider beneficial to his employer."

There Is No Conflict of Decisions

Petitioner alleges on pages 13 through 17 of his petition that this decision of the United States Court of Appeals

for the Second Circuit is in conflict with earlier decisions of the United States Courts of Appeals in the Third, Sixth and Ninth Circuits.

Petitioner claims a conflict with *Buckeye Steamship Co.* v. *McDonough*, 200 F. 2d 558 (6 C. A. 1952), cert. den. 345 U. S. 926. That was an action involving liability of the shipowner under the Jones Act, but the case is readily distinguishable. There the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him through the dock area adjacent to the vessel. In that case, in assisting his shipmate the negligent seaman was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was acting within the scope of his employment.

The opinion of the District Court (*McDonough* v. *Buckeye Steamship Co.*, 103 F. Supp. 473 at 475) makes the distinction self-evident:

> "It is clear, from the testimony of Thomas Olson, the third mate of the Andrew Upson, that defendant's employees were authorized to assume control of seamen who were too intoxicated to be allowed on the dock alone. Olson related that the customary and established practice—at the various Great Lakes docks—was for the dock guard to detain these men and either turn them over to a sober shipmate if one appeared or else call the ship. The officer in charge of the ship then would personally go ashore or would send someone else to assist the seaman. This procedure was known to defendant and was the accepted and recognized practice invariably followed."

The *Buckeye Steamship* case involved negligence within the scope of employment, since the escorting seaman was acting pursuant to both orders and custom in escorting the intoxicated shipmate through the dock area to the vessel.

There is no testimony showing that Wold, the driver of the car, was acting under orders. The act of renting and driving the U-Drive-It car was admittedly a purely personal matter.

Petitioner alleges a conflict with the decision of the Ninth Circuit in *Hostolf-Nettles, Inc. and United Pacific Insurance Co.* v. *Pillsbury*, 203 F. 2d 641 (9 C. A. 1953). It escapes us how an analogy can be made with that case, since the Jones Act was in no way involved. That was a compensation case under the Defense Bases Act, 42 United States Code § 1651, which incorporated the compensation coverage provisions of the Longshoremen & Harbor Workers' Compensation Act, 33 U. S. Code § 901 et seq., provided only that the injury was incurred in employment on Base property.

In that action the injured employee was injured on property covered by the Defense Bases Act while returning from a place of amusement in an automobile driven by a fellow-servant. The only question was whether the injured man was "engaged in any employment" (42 U. S. Code § 1651(a)) at the time of the injury. There was nothing further needed. Negligence liability was not involved. There was no need to raise any question as to whether negligence was the cause of the injury or, assuming negligence of the driver, whether the negligent act was such as to make the driver's employer liable to the injured passenger.

The minimum requirements to establish a cause of action for negligence liability go far and away beyond the minimum proof required to entitle one to workmen's compensation.

Petitioner fails to recognize the distinction between negligence liability under the Jones Act and the seaman's right to recover maintenance and cure, for he claims that the decision of the Third Circuit in *Nowery* v. *Smith*, 69 F.

Supp. 755, affirmed 161 F. 2d 732 (3 C. A. 1947) is in conflict. The language of the Third Circuit's very short opinion makes it clear that the Jones Act and negligence liability were in no way involved, for they wrote as follows (161 F. 2d 732):

> "The question presented is whether the plaintiff, a seaman, was entitled to maintenance and cure by reason of an injury suffered without fault on his part in a fight in a barroom while on shore leave in a foreign port."

The Third Circuit affirmed on the District Court opinion of Judge Bard. Judge Bard had denied defendant's motion for a new trial on the issue of maintenance and cure and had granted a new trial on the issue of the Jones Act liability for negligence. The only appealable point was the final order of Judge Bard with respect to the denial of defendant's motion for a new trial on the issue of maintenance and cure.

The elements necessary to sustain a claim for maintenance and cure fall far short of those necessary to sustain an action for indemnity based upon negligence. In *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 736 (1943), this Court stressed that breach of duty is not an element in an action for maintenance and cure when it wrote as follows:

> "And his [the shipowner's] obligation to care for the seaman's injuries is, as has been shown, in no sense a function of his negligence or fault. • • • Consequently the fact that the shipowner might not be liable to the seaman in damages for the dock-owner's negligence, cf. *Todahl* v. *Sudden & Christenson*, 5 F. 2d 462 (C. C. A.), does not relieve him of his duty of maintenance and cure."

There Is No Important Question of Federal Law Presented and the Petition Does Not Warrant Review by this Court

The petitioner disagrees with the Trial Judge and the Court of Appeals when they held that Wold and the deceased were not performing a service on behalf of the shipowner when they drove back to the ship in the U-Drive-It automobile at over 70 miles an hour in an intoxicated condition.

The dismissal by the Trial Judge and the affirmance by the Court of Appeals for the Second Circuit were not predicated upon the fact that the injuries had been sustained ashore, some miles away from the ship.

There is no question of the geographical scope of the Jones Act involved. The affirmance of the dismissal was predicated upon the fact that as a matter of law the cause of the accident could not be imputed to the respondent shipowner.

The petitioner urges that there is a fundamental conflict with Jones Act cases involving assaults insofar as geographical limitations are concerned. Actually, the two cases cited by petitioner in support of this proposition both involved assaults where the negligent act was committed aboard the vessel.

In *Kyriakos* v. *Goulandris,* 151 F. 2d 132 (2 C. A. 1945), the plaintiff was assaulted ashore by a fellow crew member by the name of Bourtis. Counsel for petitioner seems to be under the impression that the act of negligence which formed the basis for the successful action under the Jones Act was the assault. That is not true at all. The act of negligence, as is shown by the opinion of the Court of Appeals for the Second Circuit, was the failure of the master of the vessel to discharge Bouritis when he was

on notice of the latter's longstanding record of repeated assaults and abuse aboard the ship. As stated by Judge Augustus N. Hand at 151 F. 2d 135:

> "If Bouritis had been discharged during the first three days of the ship's stay at Fernandina, the incident giving rise to the assault would never have occurred. * * * If the officers choose to continue to employ a man who is known or should be known by them to be a source of peril to those who sail with him, when measures which might reasonably be expected to prevent resulting injury are not or cannot be taken, a resulting injury to a member of the crew is one for which the person injured may recover under the Jones Act, 46 U. S. C. A. § 688."

The same is true for *Nowery* v. *Smith*, previously discussed in another connection, 69 F. Supp. 755, affirmed 161 F. 2d 732 (3 C. A. 1947). Here again the negligent act was not the act of the assailant ashore but was rather the negligence of the officers in having failed to discharge the assaulter at an earlier date, thereby making the act of negligence part and parcel of the ship's business and operations. The opinion of the District Court at 68 F. Supp. 758 shows us that the only theory of negligence liability which could be applied was the possible negligence of the operators of the ship in having failed to discharge the assailant in the light of knowledge of his wicked disposition and his propensity for violent and uncalled for assaults.

The courts are not applying two standards, one to assault cases and one to ordinary negligence cases, as the petition urges.

The decision of the Court of Appeals did not hinge upon the situs of the auto accident, but on the point that the respondent shipowner owed no legal duty to the deceased to provide shore transportation to or from any of the bars which he might choose to visit while on shore leave.

CONCLUSION

For the foregoing reasons it is respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DAVID P. H. WATSON,
on the Brief.

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No. 810.

IN THE

Supreme Court of the United States

OCTOBER TERM 1955.

PATRICIA THURNAU, as Administratrix of the Estate of PHILIP GEORGE THURNAU, Deceased,

Petitioner,

against

ALCOA STEAMSHIP COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals, Second Circuit.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Throughout respondent's brief, two principal points stand out: Namely the vacuum created by the failure to even mention Reese and the glaring sealing off of Wold and Kossman in a perfectly insulated vacuum where there is not even a breath of a bus strike.

1. There is not one word mentioned about Reese and his testimony about the common practise on the SS. *Pegasus* to take men to and from the ship in the available vehicle.

This most important testimony places the case squarely within *McDonough,* and even within the exception in *Robinson, Adm'x* v. *Northeastern SS. Corp.*

2. Respondent wishes to make this Court believe as a matter of law that the utterly fantastic testimony of Wold

that he knew nothing of the bus strike, even though he later lived in Mobile, and even though many of the crew came from Mobile, even though the main shipping office was in Mobile, even though there were appeals by radio and press for men to take fellow workers to and from work, and even though as an officer he was engaged in the transportation business, where he had to know something about how the passengers and cargo were going to get off the ship.

Respondent wishes to make Wold and Kossman, deaf, dumb, and blind as a matter of law to any paralyzing bus strike, which existed for two months, and thus completely insulate itself from liability.

Insulation of such incredibly ethereal material based on such colossal ignorance and housed in such vacuums, could only be provided by a jury, if they were ever allowed to find that such a fact could exist even in this day and age of miracles.

3. Respondent without even having had the benefit of Kossman's testimony (the case was dismissed at the close of plaintiff's case) tells the Court that Kossman, a First Assistant Engineer, was prepared to swear to the same nincompoopery as Wold.

4. Petitioner can only sadly observe that if the shipowner provided such ignoramuses, so deficient in sight and hearing, it can hardly urge that it provided decedent with proper and sufficient officers, to say nothing of just ordinary seagoing personnel, and the shipowner would surely be liable for failing to supply seaworthy fellow servants. (*Keen* v. *Overseas Tankship Corp.* 194 F. 2d 515)

Equally incredible is the fact that respondent does not even mention *Paul* v. *U. S.* and *Lemon* v. *U. S.* the very decisions upon which the Court of Appeals in the decision

sought to be reviewed rested its decision at the urging of counsel for respondent, and is trying to be more learned that the Court of Appeals by fathoming reasons why the Court did not even mention the *McDonough* or *Pillsbury* cases.

Even the *Paul* case, the respondent's principal authority, had a strong dissent from Judge Biggs.

As authority in the decision sought to be reviewed, the Court cited one Court of Appeals decision (Paul) and one District Court decision (Lemon), neither of which had the slightest applicability to the facts in the petition. It failed to cite much less distinguish two applicable cases of other circuits, with contrary opinions supported by full benches.

The *per curiam* opinion stating that a shipowner is under no obligation to furnish transportation is an oversimplification of the novel question inherent in the facts.

These facts involve fellow servant negligence during shore leave committed on returning to the ship.

The two cases upon which the opinion is based in the decision sought to be reviewed are readily distinguishable since both are based on third party negligence of a total stranger to the ship.

Petitioner's decedent was not killed at the hands of a third party independent owner of a dock (Paul). Nor was he killed at the hands of a third party independent owner of a launch (Lemon), or any other third party not part of the ship's complement.

Decedent was killed at the hands of fellow servant Wold as a matter of law since both were returning to the ship in the course of employment (McDonough), (and the decision is strangely silent on *McDonough*, although urged throughout petitioner's brief in the Court of Appeals as well as *United Pacific Ins. Co.* v. *Pillsbury*).

Since the *Paul* case was by a divided court, with a dissent from Judge Biggs, and the decision sought to be reviewed has completely failed to consider two contrary opinions written by two other Circuit Courts of Appeals, supported by full benches, it is respectfully urged that certiorari should be granted.

A. Assume arguendo, that Wold or Kossman had been sued individually or jointly for their negligence, would not their individual and joint defense be that they were acting in the course of employment and within the scope of employment? And that their actions were reasonable under the circumstances of the bus strike.

a. Wold as the driver of the car and officer of the defendant to escape liability for the unquestioned negligence proved by the photograph, would have urged that he was taking a shipmate back to the ship, where both were attached to the ship under whose articles they were, and the accident occurred because of the haste in so doing, and acted reasonably under the circumstances.

b. Kossman, as high ranking officer of the defendant aboard the SS. *Pegasus,* to escape liability for having loaned the car to young Wold, would have urged that members of the crew had been transported to and from the ship, driven by Wold, while he sat in the car, and the only reason that he hired the U-Drive-It was because of the strike, and as Reese testified, it was common practice on the ship to take seamen to and from the ship in the available vehicle.

c. Both would have urged that there were radio, and press appeals for car drivers to take fellow workers to and from work because of the bus strike, and question why they should be liable and not the company.

d. Both would have urged that *ALCOA* had principal shipping offices in Mobile, Alabama, and since this was the principal shipping port for this company in the Western Hemisphere, that *ALCOA* must have known of these appeals, as well as Kossman.

B. It is reasonable to assume that if Wold had been sued, the question of whether he had acted reasonably in performing his duties in his masters' behalf in taking a shipmate back to the ship, during a bus strike, would have been of prime importance.

Kossman would undoubtedly have urged that as a high ranking officer of respondent on the SS. *Pegasus*, he was acting for the benefit of the ship in hiring the car, and would have pointed to the fact that Wold had never hired such a vehicle before, and he, Kossman, had hired it only once before which might have been during the strike.

a. Kossman and Wold would have stressed the fact that decedent, was also an officer of the respondent, and a fellow servant.

C. Wold could have pointed significantly to the fact that although the trial did not come up because the calendar was four years behind, yet he was employed all that time by respondent, only once in three years, (it was three years later when his deposition was taken in Mobile) had he been on one of respondents' ships that had come farther north than Mobile, and then for only a day or two did it stop near New York where the widow resided.

Were the respondent's actions consistent with a confident belief that only Wold and Kossman were individually liable, and not the shipowner??

D. What court would have said as a matter of law that they were acting individually and were individually liable and that the issue did not even have to be submitted to a jury as the court has done in the decision sought to be reviewed.

The case falls squarely within the *McDonough* case and even the *Robinson* case on the testimony of Reese that it was common practice on the SS. *Pegasus* to take men to and from the ship in the available vehicle.

And certainly Kossman, as a first assistant engineer, would have authority to transport men to and from the ship during a bus strike in a vehicle which he could provide, and in this emergency when radio and press appeals called for people to transport fellow workers to and from work, he can not be said as a matter of law to have acted without the scope of his employment, especially where defendant had its principal shipping office in Mobile, and must have known of these conditions including such radio and press appeals. *Westcott* v. *U. S. Fidelity & Guaranty*, 156 F. 2d 20 (4th Cir.); *Heaps* v. *Cobb*, 45 A. 2d 73.

Nor would the court as a matter of law be justified in imputing such complete stupidity to the shipping office in Mobile which respondent seeks to ascribe to Wold and Kossman.

1. Under the undisputed facts in this case, of the bus strike effects, and the testimony of Reese that it was common practice on this ship to transport crewmen to and from the ship in the available vehicle, Wold was acting in the scope of his employment in transporting decedent back to the ship in the very same car that other seamen had been taken to and from the ship.

Heaps v. *Cobb* (*supra*).

2. Defendant can not maintain that it did not know of the effects of the bus strike in the face of Douville's undis-

puted testimony as to radio and press appeals as Douville testified that "Neighbors join with one another, in forming car pools, to take people to work and return". It must be borne in mind that Mobile, Alabama, was the main shipping port for the SS. *Pegasus,* where aluminum ore cargoes were discharged at the aluminum ore docks.

It was also the port where the passengers were discharged.

It was also the port where old articles were terminated and new ones signed.

It was the port where defendant maintained very important offices in its operation if not the most important shipping offices in the Western Hemisphere.

Heaps v. *Cobb* (*supra*).

3. Since the defendant engaged in the transportation business, undoubtedly was aware of the bus strike, (since in treatment of passengers as well as cargo and crew, it would soon be out of business if it were blind to such patent transportation difficulties) it can not be said as a matter of law by a Court that Kossman as a high ranking officer of the SS. *Pegasus,* did not act within the scope of his employment in hiring the car when Reese testified it was common practice on the ship to transport crewmen to and from the ship in the available vehicle.

Wold too as an officer of the defendants fully familiar with the common practice of transporting crewman to and from the ship in the available vehicle during this bus strike can not be said as a matter of law to have acted without the scope of his employment in transporting decedent another officer back to the ship, and to have acted purely for his own pleasure.

4. Bearing in mind that defendant is an inanimate object that must necessarily act through officers, how can Kossman's actions as a high ranking officer of the subject vessel SS. *Pegasus* in turning the car over to Wold, another officer, he himself according to Wold was in the car when Wold was driving and men were thus transported, be construed as a matter of law as not being within the scope of his employment, and being purely a private act for his own pleasure.

Especially when only seamen from the SS. *Pegasus* were transported in this vehicle in Mobile, during the bus strike, and when this vehicle was hired solely for the two day stay in Mobile.

5. In taking account of the authority of Kossman in hiring this vehicle, the proof shows in the years of service with the defendant, Kossman had hired a U-Drive-It only once before (and that might have been during the strike) and Wold had never hired a U-Drive-It.

Conclusion.

The Court of Appeals affirmed a dismissal of the complaint on the authority of *Paul* vs. *U. S.*, which had a dissenting opinion by Judge Biggs.

The decision sought to be reviewed is contrary to the law in other Circuits.

Respondent's brief fails to even attempt to uphold Judge Clark and Judge Medina on the very cases it urged, and now urges as a fact Kossman's proposed testimony.

Petitioner has been deprived of a jury trial without due process in this death action.

Swensson v. *N. Y. Albany Despatch Co.*, 309 N. Y. 497.

Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

Dated April 18, 1956.